Supreme Court of the United States,

OCTOBER TERM, 1903.

ROBERT A. CHESEBROUGH,
Plaintiff in Error,

AGAINST

THE UNITED STATES.

No. 152.

This case comes before the court by a writ of error to the United States District Court for the Southern District of New York.

The action was brought to recover the sum of Six hundred dollars, which, under the Act of Congress of June 13th, 1898, the complainant was compelled to pay as a tax upon the conveyance of a parcel of real estate owned by him and as a condition without which such conveyance was prohibited, made punishable as a misdemeanor, and the instrument of conveyance declared invalid and of no effect, and not competent evidence in any court.

Upon a demurrer by the attorney for the United States, judgment was rendered sustaining the demurrer and dismissing the petition (Rec., pp. 3 to 7). The ground of the action is the unconstitutionality of the statute imposing the tax.

For the convenience of the court the relevant portions of the Act of June 13th, 1898, and of the Constitution are here printed:

THE STATUTE.

"On and after the first day of July, 1898, there "shall be levied, collected and paid, for and in re-

"spect of the several bonds, debentures or cer-
"tificates of stock, and of indebtedness, and other
"documents, instruments, matters and things men-
"tioned and described in Schedule A of this act,
"or for or in respect of the vellum, parchment, or
"paper upon which such instruments, matters or
"things, or any of them, shall be written or printed
"by any person or persons, or party who shall
"make, sign or issue the same, or for whose use or
"benefit the same shall be made, signed or issued,
"the several taxes or sums of money set down in
"figures against the same, respectively, or other-
"wise specified or set forth in the said schedule."
(Act of June 13th, 1898, §6.)

Schedule A:

"Conveyance: Deed, instrument, or writing
"whereby any lands, tenements, or other realty sold
"shall be granted, assigned, transferred, or other-
"wise conveyed to, or vested in, the purchaser or
"purchasers or any other person or persons, by his,
"her or their direction, when the consideration
"or value exceeds one hundred dollars and does
"not exceed five hundred dollars, fifty cents; and
"for each additional five hundred dollars or frac-
"tional part thereof in excess of five hundred dol-
"lars, fifty cents." (Act of June 13th, 1898,
Schedule A.)

"That if any person or persons shall make, sign
"or issue, or cause to be made, signed or issued,
"any instrument, document, or paper of any kind
"or description whatsoever, without the same be-
"ing duly stamped for denoting the tax hereby im-
"posed thereon, or without having thereupon an
"adhesive stamp to denote said tax, such person or
"persons shall be deemed guilty of a misdemeanor,
"and upon conviction thereof shall pay a fine of not
"more than one hundred dollars, at the discretion
"of the court, and such instrument, document or

" paper aforesaid shall not be competent evidence " in any court." (Act of June 13th, 1898, §7.)

" That any person or persons who shall register, " issue, sell or transfer or who shall cause to be is- " sued, registered, sold or transferred any instru- " ment, document or paper of any kind or descrip- " tion whatsoever mentioned in Schedule A of this " Act, without the same being duly stamped or hav- " ing thereupon an adhesive stamp for denoting the " tax chargeable thereon and cancelled in the man- " ner required by law, with intent to evade the " provisions of this Act shall be deemed guilty of " misdemeanor and upon conviction thereof shall " be punished by a fine not exceeding fifty dollars " or by imprisonment not exceeding six months, or " both, in the discretion of the court, and such in- " strument, document or paper not being stamped " according to law shall be deemed invalid and of " no effect." (Act of June 13th, 1898, §13.)

THE CONSTITUTION.

" Representatives and direct taxes shall be ap- " portioned among the several States which may be " included within this Union, according to their " respective numbers. * * * The actual " enumeration shall be made within three years " after the first meeting of the Congress of the " United States and within every subsequent term " of ten years." (Const., Art. 1, §1, subd. 3.)

" No capitation, or other direct tax shall be laid, " unless in proportion to the census or enumeration " herein before directed to be taken." (Const., Art. 1, §9, subd. 4.)

" Representatives shall be apportioned among the " several States according to their respective num- " bers." (XIVth Amendment, §2.)

If the tax here in question be a direct tax the statute attempting to impose it is admittedly unconstitutional.

Contents of the Brief.

This Brief is divided into the following heads:

1. Fundamental propositions upon which the argument of plaintiff in error is based.

2. The argument that the tax is a direct tax considered on principle and as an original question.

3. Examination of the genesis and historical development of stamp taxes on conveyances of real estate in England and the United States.

4. Answers to objections and a consideration of the cases cited by the defendant in error as adverse to plaintiff's contention.

POINT I.

Fundamental propositions upon which the argument of plaintiff in error is based.

We contend:

A. The question is whether this is a direct tax; if so, it is necessarily void because not apportioned.

The category of direct taxes, within the meaning of that phrase as used in the Constitution, is determined partly by an examination of the question as an original one in the light of general, logical and economic considerations and partly in the light of the history of taxation in England and America. It is settled law that the Court will look at the real substance and effect of the tax and not be governed or influenced by the particular form or guise in which the tax is laid.

B. Property is a combination or bundle of separate rights or powers conferred by the law upon persons. The three essential rights composing the legal concept "property" are

(1) possession and the right thereto;
(2) income or yield, and
(3) alienability *inter vivos.*

The destruction or inhibition of any of these rights would be a direct destruction or deprivation of property.

C. The tax is direct because it falls directly upon one of the fundaments of property, that is to say, alienability, in precisely the same manner as a tax on land or general property falls upon the right of possession and an income tax on the right of enjoyment. Each of these latter taxes is a direct tax upon the property because upon one of the essential legal attributes which constitute property.

Take away possession or the right thereto and the basis of property fails; confiscate income and the present concept of property as consecrated by our Constitution and legal institutions is erased from our law; prohibit the power of sale and property becomes a mere emasculated right of possession known only to primitive times and to the ancient feudal system based on the ultimate ownership of all land by the crown.

D. There is nothing either in the history of the stamp tax on conveyances in England or in the United States which militates against the view that the tax here involved is a direct tax, but on the contrary this history would tend to show that the tax is really only in form a stamp tax, but a direct property tax in fact. This is also the view of the standard writers on political economy.

The decisions of this Court do not contravene appellant's view, but on the contrary the reasoning in recent cases, notably, *The Income Tax cases*, 157, 158 U.

S., *Nicol* v. *Ames*, 173 U. S., and the *Fairbank* case, 181 U. S., necessarily involve principles, the logical inference from which demonstrate this tax to be direct.

POINT II.

The argument that the tax is a direct tax considered on principle and as an original question.

Austin in his great work on Jurisprudence defines ownership as follows:

> " Section 515. The right to use or deal with " some given subject in a manner or to an extent " which though not unlimited is indefinite. * *
>
> " 518. It is a right residing in a person over or " to a person or thing and availing against other " persons universally or generally. * *
>
> " 1103. It is a right imparting to the owner a " power of indefinite user, capable of being trans- " mitted to universal successors by way of descent, " and imparting to the owner the power of dis- " position from himself. * * (Strictly speaking " and to make the definition apply to every sys- " tem of law), *disposition here must be confined to " an alienation to take effect in the lifetime of the " party entitled. The powers of alienation in ex- " tremis, are* in most systems of law, subject to pecu- " liar restraint."

The more recent and equally learned and scientific writer, Holland, in his Jurisprudence, page 194, says:

> " It is a great advance in civilization when law " throws around the mere fact of possession that " protection which the possessor could previ

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" ously have won for it only by his own right " hand. It is a still further advance when law " gives to a man that far ampler measure of right " over an object, quite irrespectively of his having " any actual or even constructive control over it, " which is known as 'Ownership.' The higher is " no doubt a development of the lower right. * * " The right of ownership is, however, unlimited " only in comparison with other rights over ob- " jects. In accordance with the maxim '*sic utere* " *tuo ut alienum non laedas.*' It must always be en- " joyed in such a way as not to interfere with the " rights of others and is therefore defined in the " French Code as: 'Le droit de jouir et dis- " 'poser des choses de la manière la plus absolu " 'pourvu qu'on n'en fasse pas en usage prohibé par " *les lois ou par les règlements.* (Art. 544.) * * Va- " rious attempts have been made to enumerate the " attributes or powers of an owner. He is said to " have rights '*utendi*,' '*fruendi*,' '*abutendi*,' '*fructus* " *percipiendi*,' '*possidendi*,' '*alienandi*.' *and* '*vendi-* " *candi*.' But what has to be said with reference to " the orbit or contents of the right of ownership " may be conveniently arranged under the three " heads *of possession, enjoyment and disposition.* " * * The right of disposition carries with it the " right of alteration or destruction and also *the* " *right of alienation.* (p. 196.) * * * *" Mirabeau defines property as " *un avantage conféré par les* " *conventions sociales.* (p. 152.) Recent investiga- " tors, and especially Sir Henry Maine have abun- " dantly shown that there is in early times but " little trace of individual ownership. * * * The " idea that property really belongs to a family " group and that the right of an individual is " merely to administer his share of it during his " lifetime may be said still to survive in those pro- " visions against the total disinheriting of rela- " tions which modern systems have borrowed

"from the Roman law and less obviously in the "rights given to next of kin under statutes of "distribution. * * The principle that a man "may voluntarily select the person on whom his "property is to devolve after his death is of later "origin than the principle of intestate succession. "Such a selection had at first to be ratified by "legislative authority in order to oust the rights "of the relatives." (p. 153.)

From the above quotations it is evident that the power of disposition *inter vivos* is an essential attribute of property. It is equally fundamental with possession and enjoyment and the three together form the legal concept of property which is protected by the Constitution and which even the paramount power of Congress cannot attain. It is idle to argue that in the remote past or under the Norman feudal system once prevalent in England property was not alienable or allodial; all legal concepts and institutions are the product of evolution and development; in using the word "property" our Constitution and our laws do not mean the hut which the primitive Ayran was able to occupy so long, and only so long, as his good right hand could vanquish all comers who attempted to disturb his precarious possession, but "property," as that term is now understood and consecrated in the United States Constitution, has a fixed and definite meaning, the result of centuries of legal and social development.

We insist somewhat upon these seemingly elementary principles for the reason that we believe a tax on the power of disposition *inter vivos* (that is to say sale or conveyance) is direct, precisely as is a tax upon property generally or upon the income thereof, within the meaning of the Constitution, a direct tax. (*Income tax cases.*) Alienability cannot be considered a less essential part of property than income or possession. It is in fact a fundamental right. As the learned Mr. Justice Brown

has so aptly said (*United States* v. *Perkins*, 163 U. S., 625):

> " While the laws of all civilized States recognize " in every citizen the absolute right to his own " earnings and to the enjoyment of his own prop- " erty, and the increase thereof, *during his life*, " except so far as the State may require him to " contribute his share for public expenses, the " right to dispose of his property by will has " always been considered purely a creature of " statute and within legislative control." (p. 627.)

Numerous decisions of this Court, notably *Magoun* v. *Illinois Trust Company*, 170 U. S., 283, *United States* v. *Perkins*, 163 U. S., 625, and the recent case of *Knowlton* v. *Moore*, 178 U. S., 41, and the cases there cited, abundantly show that the right to dispose of property by testament or the right to take by intestate succession are not fundamental rights of property protected by the Constitution of the United States.

It is this distinction between the right of alienation *inter vivos* and the rights just mentioned which make inapplicable to the present case the case of *Knowlton* v. *Moore* and others which had to deal with a purely municipal right, that is to say heritability and testacy.

The criterion as to whether this tax is in principle one directly imposed upon the property transferred is easily seen by the following considerations: If Congress should enact generally that all real estate should be inalienable absolutely or only under legislative or administrative permission, it is perfectly clear that the inhibition of the Constitution against the taking of property without due process of law or without the payment of proper compensation would be absolutely violated, and this would be equally true of legislation by the States.

A very good illustration is found in the case of *Wynehamer* v. *The People*, in 13 N. Y., 378. An act

of the Legislature of New York made in pursuance of a desire to restrain the use of intoxicating beverages made it unlawful to sell certain alcoholic liquors. This was held to prevent a disposition of property by the owner and thus to virtually destroy that property, and hence to contravene Article 1, Section 6 of the State Constitution,

> "That no person shall be deprived of life, lib-
> "erty or property without due process of law;
> "nor shall private property be taken for public
> "use without just compensation."

Judge Comstock there remarked in referring to the sale of liquors (p. 384):

> "In this country the right of property in them
> "(liquors) was never so far as I know for an instant
> "questioned. In this State they were bought and
> "sold like other property. * * In short, I do
> "not understand it to be denied that they were
> "property in just as high a sense as any other
> "possession which a citizen can acquire."

After stating the objections against the use of alcohol on social grounds, he continues:

> "But if such arguments can be allowed to sub-
> "vert the fundamental idea of property, then
> "there is no private right entirely safe, because
> "there is no limitation upon the absolute discre
> "tion of the legislature, and the guarantees of
> "the Constitution are a mere waste of words.
> "The foundation of property is not in philosophic
> "or scientific speculations, nor even in the sug-
> "gestions of benevolence or philanthropy. It is
> "a simple and intelligible proposition, admitting,
> "in the nature of the case, of no qualification,
> "that that is property *which the law of the land*
> "*recognizes as such. It is, in short, an institution*
> "*of law, and not a result of speculations in science,*

" *in morals or economy.* (pp. 384-5.) * * As property " the right to sell them (liquors) is denied and *their* " *commercial value is thus annihilated.* (p. 389.) " * * When a law annihilates the value of proper- " ty *and strips it of its attributes, by which alone it is* " *distinguished as property*, the owner is deprived " of it according to the plainest interpretation, " and certainly within the spirit of a constitution- " al provision intended expressly to shield private " rights from the exercise of arbitrary power." " (p. 398.)

Upon principle then, it is entirely clear that a tax upon alienability is a direct tax upon property as Mr. Justice Peckham well remarked in *Nicol* v. *Ames*, 173 U. S., 509, at p. 518.

" It is asserted to be a direct tax, because it is " a tax upon the sale of property measured by the " value of the thing sold, and such a tax is a di- " rect tax upon the property itself, and therefore " subject to the rule of apportionment. Various " cases are cited, from *Brown* v. *Maryland*, 12 " Wheat., 419, down to those involving the valid- " ity of the income tax, 157 U. S., 429; 158 U. S., " 601, for the purpose of proving the correctness " of this proposition. All the cases involved the " question whether the taxes to which objection " was taken amounted practically to a tax on " the property. If this tax is not *on the property* " *or on the sale thereof*, then these cases do not " apply." (pp. 518-19.)

The Court then holds that the tax was not upon the sale itself but upon the privilege of dealing at an exchange :

" A sale at an exchange does form a proper " basis for a classification which excludes all sales " made elsewhere from taxation." * *

> " A tax upon the privilege of selling property at " the exchange * * differs radically from a tax up- " on every sale made in any place. *The latter tax is* " *really and practically upon property. It takes no* " *notice of any kind of privilege or facility, and* " *the fact of a sale is alone regarded.*" (p. 521.)

While the question here involved has never been directly decided in this Court the foregoing extract from the opinion of *Nicol* v. *Ames* would clearly indicate the opinion of the Court to be that a tax upon all sales generally was a direct tax upon the property. Direct taxes have been defined by this Court as follows:

> " Direct taxes in a general and large sense may " be described as taxes derived immediately from " the person or from real or personal property " without any recourse therefrom to other sources " for reimbursement." *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S., 429, at p. 588.

It cannot, of course, be seriously contended that this tax is in its nature a stamp tax. We will see in examining the historical development of stamp taxation that there is such a thing as a true stamp tax, that is to say, a tax imposed under the guise of a stamp upon certain legal instruments and which tax is levied upon the instruments as such and apart from the property or transaction to which they have reference.

The Court will look at the substance of a tax and not at the form as was clearly held in the decision in the recent case of *Fairbank* v. *The United States*, 181 U. S., 283. Even the dissenting opinion in that case shows that the tax here involved which is proportioned to the amount of the transaction is not a real stamp tax. Mr. Justice Harlan there says (p. 317):

> " If Congress had graduated the stamp duty " *according to the quantity or value* of the articles " exported, there might have been ground for

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"holding that the purpose and the necessary
"result was to tax the property and not the
"vellum, parchment or paper on which the bill of
"lading was written or printed."

And again he says:

"A stamp duty has now, and has had for
"centuries, a well-defined meaning. It has always
"been distinguished from an ordinary tax *meas-*
"*ured by the value* or kind of the property taxed.
"If Congress, in respect of a bill of lading for
"articles to be exported, had imposed a tax of
"five thousand dollars for and in respect of the
"vellum, parchment or paper upon which such
"bill was written, the Courts, looking beyond
"form and considering substance, might well have
"held that such an act was contrary to the
"settled theory of stamp tax laws, and that the
"purpose and necessary operation of such legisla-
"tion was, in violation of the Constitution, to tax
"the articles specified in such bill and not to im-
"pose simply a stamp duty." (p. 318.)

The illustration given by the learned Justice is especially apposite in this case as the stamps on realty conveyances often amounted to hundreds of dollars and sometimes went into the thousands, thus making it an absurdity to consider the tax as one upon the parchment or vellum upon which the conveyance was printed.

How far this Court in determining the question as to whether a tax is direct or not will be governed by the opinions of economists as to the shifting of the incidence of the tax from the seller to the buyer was much discussed in the famous Income Tax Cases. It is an economic question much debated and upon which economists have held various and shifting theories. The Court has held repeatedly that it will not be guided by

the views of economists upon this point and will only advert to the question of incidence as a make-weight in reaching the conclusion as to whether a tax is direct or indirect. The incidence is however, an argument which the Court will look at among others in reaching a conclusion.

This tax is a direct tax in the economic sense.

The framers of the Constitution were familiar with the "Wealth of Nations," the great standard work on economics. Their views as to what taxes were direct *i. e.*, incapable of being shifted must have been largely influenced by the opinion of Adam Smith. He says:

> "Taxes upon the transference of property from "the dead to the living, fall finally as well as im- "mediately upon the person to whom the prop- "erty is transferred. Taxes upon the sale of land "fall altogether upon the seller. The seller is "almost always under the necessity of selling, and "must, therefore, take such a price as he can get. "The buyer is scarce ever under the necessity of "buying, and will, therefore, only give such a price "as he likes. He considers what the land will "cost him in tax and price altogether. The more "he is obliged to pay in the way of tax, the less "he will be disposed to give in the way of price. "Such taxes, therefore, fall almost always upon a "necessitous person, and must therefore, be fre- "quently very cruel and oppressive. * * *
>
> "Such stamp duties as those in England upon "cards and dice, upon newspapers and periodical "pamphlets, etc., are properly taxes upon con- "sumption; the final payment falls upon the per- "sons who use or consume such commodities. "Such stamp duties as those upon licenses to re- "tail ale, wine, and spirituous liquors, though in- "tended, perhaps, to fall upon the profits of the re- "tailers, are likewise finally paid by the consumers "of those liquors. Such taxes, though called by

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" the same name, and levied by the same officers
" and in the same manner with the stamp duties
" above mentioned upon the transference of prop-
" erty, are however of a quite different nature, and
" fall upon quite different funds."

Smith on the Causes of the Wealth of Nations, Article 1, pp. 685, 686, 687.

The eminent John Stuart Mill, whose work is the "classic" on political economy agrees with the "father of political economy" that the realty conveyance tax is direct in its nature.

" Of taxes on contracts, the most important are
" those on the transfer of property; chiefly on pur-
" chases and sales. Taxes on the sale of consum-
" able commodities are simply taxes on those com-
" modities. If they affect only some particular
" commodities, *they raise the prices of those com-*
" *modities, and are paid by the consumer. If the*
" *attempt were made to attack all purchases and*
" *sales, which, however absurd, was for centuries*
" *the law of Spain, the tax, if it could be enforced,*
" *would be equivalent to a tax on all commodities*
" *and would not affect prices;* if levied from the
" sellers, it would be a tax on profits, if from the
" buyers a tax on consumption; and neither class
" could throw the burden upon the other. If con-
" fined to some one mode of sale, as for example
" by auction, it discourages recourse to that mode,
" and if of any material amount, prevents it from
" being adopted at all, unless in a case of emerg-
" gency; in which case as the seller is under a
" necessity to sell, but the buyer under no neces-
" sity to buy, the tax falls on the seller; and this
" was the strongest of the objections to the auc-
" tion duty; it almost always fell on a necessitous
" person, and in the crisis of his necessities.

" Taxes on the purchase and sale of land are,

" in most countries, liable to the same objec-
" tion. Landed property in old countries is sel-
" dom parted with, except from reduced circum-
" stances or some urgent need; the seller therefore,
" must take what he can get, while the buyer,
" whose object is an investment, makes his calcu-
" lations on the interest which he can obtain for
" his money in other ways, and will not buy if he
" is charged with a government tax on the trans-
" action. It has indeed been objected, that this
" argument would not apply if all modes of per-
" manent investment, such as the purchase of gov-
" ernment securities, shares in joint-stock com-
" panies, mortgages and the like, were subject to
" the same tax. But even then, if paid by the
" buyer, it would be equivalent to a tax on inter-
" est; if sufficiently heavy to be of any impor-
" tance, it would disturb the established relation
" between interest and profit; and the disturbance
" would redress itself by a rise in the rate of inter-
" est, and a fall of the price of land and of all se-
" curities. *It appears to me, therefore, that the*
" *seller is the person by whom such taxes, unless*
" *under peculiar circumstances will generally be*
" *borne.*

" All taxes must be condemned which throw ob-
" stacles in the way of the sale of land, or other
" instruments of production. Such sales tend nat-
" urally to render the property more productive.
" The seller, whether moved by necessity or
" choice, is probably some one who is either without
" the means, or without the capacity, to make the
" most advantageous use of the property for pro-
" ductive purposes; while the buyer on the other
" hand, is at any rate not needy, and is frequently
" both inclined and able to improve the property,
" since, as it is worth more to such a person
" than to any other, he is likely to offer the high-
" est price for it. All taxes, therefore, and all

" difficulties and expenses, annexed to such con-
" tracts, are decidedly detrimental; especially in
" the case of land, the source of subsistence, and
" the original foundation of all wealth, on the im-
" provement of which, therefore, so much depends."

Concluding therefore upon this point, we respectfully submit that upon principle and in its very nature the tax is direct because imposed upon the power of alienation which is one of the three essential legal rights constituting property; consequently it must fall within the same category as a tax on the possession of property, or upon its income (enjoyment). The three taxes are necessarily in the same category, *i. e.*, direct taxes. This result is inevitable if the question is to be viewed from the standpoint of logic, of economics or of judicial precedent. We can appeal to no other standards.

POINT III.

Examination of the genesis and historical development of stamp taxes on conveyances of real estate in England and the United States.

In the standard work upon the history of taxation in England (Dowell), it is stated that stamp taxes originated in England in 1694, having been borrowed from Holland where they were imposed upon all legal documents. Dowell, Vol. II, p. 62.

> These stamp taxes were on royal grants of presentations to benefices and various instruments of that class, and also for a multiplicity of other legal instruments.
>
> " The tax contained the germs of the important
> " taxes on deeds of conveyance, settlement, mort-

"gage and lease, probates of wills." Dowell, Vol. II, p. 62. Stamps became *not only a method of taxing legal instruments but a method of collecting taxes of various kinds, usually excises.*

"The meaning of stamp duties in this chapter "is limited to duties on documents and writings "having a legal operation or forming necessary "steps in suits in the law Courts, briefly, instru- "ments and law proceedings. Many taxes of "various descriptions have at different times, "some when first imposed, others subsequently, "by transfer from another branch of the revenue, "been placed, for purposes of administration, "under the management of the Commissioners of "stamps, and during their continuance in that "position have been termed 'stamp duties' or "'duties of stamps.' The taxes on horses, race- "horses, stage coaches, post horses, passengers by "railway, property insured from risk of fire, on "hawkers and peddlers, pawnbrokers, appraisers, "bankers, attorneys and solicitors, proctors and "conveyancers, publicans and tavern keepers; on "hats, gloves and mittens, hair powder and poma- "tum, cosmetics, proprietary medicines, choco- "late, cards and dice; on legacies and successions "of personal property on a death, and others "have been or are *stamp duties in this sense.* In "this work *these taxes* will be found under the "heads of taxes *on persons, on property* or some- "thing analogous to property, or on articles of "consumption notwithstanding the fact that they "may have been at some time unstamped 'duties "of stamps,' as taxes misplaced in the stamp "branch were termed in revenue language, or "'stamp duties upon matters or things' as they "are termed in several Acts of Parliament in "contradistinction to stamp duties upon instru- "ments." Dowell, Vol. III, 321.

The tax on a conveyance or deed was originally a fixed amount upon the number of folios used.

> "The duties were charged for every skin or piece " of parchment or paper upon which any instru- " ment was written, and in order to prevent any " curtailment of length with a view to avoid pay- " ment of the duties, deeds and writings were re- " quired to be engrossed and written in the man- " ner theretofore customary. *The tax was, there- " fore, to a certain extent a tax on the amount of " paper used.*" Dowell, Vol. III, 324.

In 1714 for the first time appears the principle of percentage tax on the amount of the transaction.

> "By this Act (1714) the duties on grants of money " and offices were increased by reference to the " amount granted and the value of the office. " This is interesting as the commencement of *ad " valorem* charges, that is to say, charges having " reference to the magnitude of the transaction as " opposed to the length of the instrument." (p. 326.) The deed duty was not, however, changed from an ordinary stamp tax to percentage tax. Although Pitt attempted to do so he failed.
>
> "In 1795 the duty upon deeds was raised to 10s. " an amount which was payable in respect of " every skin on which the deed was engrossed, the " number of words or folios to be written on a " single skin of parchment was still limited by " law and therefore *in principle the tax continued " to be a tax on deeds by reference to the length and " such had been up to this date the governing prin- " ciple of the stamp tax.*" *Id.* pp. 329–330.

The English Stamp Act of 1870 consolidating the various stamp duties imposes a percentage duty on conveyances on sale which is defined as "any instrument whereby any property upon the sale thereof is

legally or equitably transferred to or vested in the purchaser."

It thus appears that the development of the percentage or progressive stamp tax is a late one in English law and not until quite recently has it been applied to deeds or conveyances of sale. The question whether such a tax was not a direct tax did not and could not arise as a legal question in England as the English Parliament is, of course, bound by no limitations in this respect as is the Congress of the United States. The history of British taxation does not show the adoption of any definite rule or scientific classification of direct and indirect taxes. Dowell, for instance classifies taxes as follows:

> First. Taxes on persons, capitation or occupation.
>
> Second. Property, land, income, movable, death duties, property sold by auction and property insured.
>
> Third. Taxes analogous to a property tax, for instance, hearth-money, window tax, inhabited houses, taxes on domestic establishments, persons having horses, dogs, servants, guns, etc.
>
> Fourth. Stamp duties on legal instruments and contracts. Table of Contents, Vol. III.

In the United States this tax on real estate conveyances has never been imposed but once before. While the laws of 1797 (Chap. 11, Act. July 6th) as well as the laws of 1813 (Chap. 53, August 2nd) provided various progressive stamp taxes, taxes on bonds, promissory notes, etc., conveyances or sales are not included. It was reserved for the omnibus and omnivorous civil war tax law of 1862, 12 Stat. at L., 479, to lay a tax on

> " any deed, instrument or writing whereby any
> " lands, tenements or other realty sold shall be

" granted, assigned, transferred or otherwise con-
" veyed to or vested in the purchaser or purchas-
" ers, or any other person or persons by his, her
" or their direction."

It is thus evident that there is nothing either in English history or the practice of the government save the statute just mentioned which could serve as a precedent for contending, as has been contended in other tax cases in this Court, that long continued congressional or administrative usage should be considered as an element in determining the constitutionality of the tax.

In the *Fairbank* case, although the Acts of 1797 and 1813, as well as that of 1862, had provided for a tax on foreign bills of lading, the Court nevertheless held that such action on the part of Congress in no way precluded it from examining into the real nature of the tax itself and used the following language, which is even more pertinent to this tax, the sole legislative precedent for which is to be found in the tax of 1862.

" It will be perceived that these stamp duties
" have been in force during only three periods:
" First, from 1797 to 1802; second, from 1862 to
" 1872; and third, commencing with the recent
" Statute of 1898. It must be borne in mind also
" in respect to this matter that during the first
" period exports were limited, and the amount of
" the stamp duty was small, *and that during the*
" *second period we were passing through the*
" *stress of a great civil war or endeavoring to*
" *carry its enormous debt; so that it is not*
" *strange that the legislative action in this respect*
" *passed unchallenged.* Indeed it is only of late
" years, when the burdens of taxation are increas-
" ing by reason of the great expense of govern-
" ment, that the objects and modes of taxation
" have become a matter of special scrutiny. But
" the delay in presenting these questions is no ex-

"cuse for not giving them full consideration and "determining them in accordance with the true "meaning of the Constitution."

Fairbank v. U. S., 181 U. S., page 311–12.

The above case held that a tax of 25 cents on bills of lading of goods intended for export, is a tax on the export itself, and therefore obnoxious to the constitutional restriction as to the taxation of exports. The reasoning of this case to the effect that form and not substance will be looked into is very apposite here.

Mr. Justice Brewer cites among other cases, that of *Brown* v. *Maryland*, 12 Wheat., 419, in which a licensed tax upon the importers of foreign articles was held to be in fact, though not in form, a tax on imports and therefore one which a State could not constitutionally levy. He quotes with approval the language of Chief Justice Marshall as follows:

"All must perceive, that a tax on the sale of an "article, imported only for sale, is a tax on the "article itself. It is true the State may tax occu- "pation generally, but this tax must be paid by "those who employ the individual, or is a tax on "his business. * * This the State has a right to "do, because no constitutional prohibition extends "to it. So a tax on the occupation of an im- "porter is, in like manner, a tax on importation. "* * * This the state has not a right to do, be- "cause it is prohibited by the Constitution."

It is a misapprehension to assume as did the learned District Judge in the case of *Thomas* v. *The United States*, that *Brown* v. *Maryland*, the *Fairbank* case, and those of a similar class are cited by us as authority for the proposition that because a tax on an importer or an export bill of lading was held to be a tax upon an import, that by parity of reasoning a tax on a deed of conveyance, is therefore necessarily a

direct tax. It is not contended that any tax falling within the export prohibition clause of the Constitution is necessarily a direct tax. These cases are not cited, with any such purpose, but to show that the Court will look into the real nature of the tax whatever its form.

In this case a similar examination of the tax shows it to be a tax upon the power to sell, which is an integral property right, and by taxing which, property is directly burdened within the meaning of the words "direct taxes."

POINT IV.

Answers to objections and a consideration of the cases cited by the defendant in error as adverse to contention of plaintiff in error.

The objections which will probably be urged by the learned Attorneys for the Government in opposition to our position have been succinctly set forth by Circuit Judge Thomas in the case of *United States* v. *Thomas*, Fed. Rep., recently decided. upon the question as to the constitutionality of the tax on transfer of stock certificates. While some of the questions in that case have no bearing upon the case at bar by reason of the nature of corporate certificates many of the arguments used by the Circuit Judge in upholding the validity of the tax therein involved would apply, if sound, equally well to the tax here in question. His objections considered *seriatim* as stated, by him, are:

1. "The expressions in the cases where no tax was "valid, that a tax on vendors or occupations, or "shipping bills, was a forbidden tax on the com- "modities, would, if applied to instances where "the taxing power has been uniformly recognized, "vitiate the same."

This is based upon a misconception of the position of the plaintiff in error. While a tax upon a foreign importer is a tax upon the thing imported, and therefore invalid, we do not contend that a tax on the occupation of importers is itself a direct tax; it may be considered an excise or occupation tax such as has been imposed in England from early times and has been in force in the United States several times since the adoption of the Constitution. This distinction is pointed out by Mr. Justice Brown in his dissenting opinion in *Pollock* v. *The Farmers' Loan & Trust Company*, 158 U. S., 691. In that opinion he reviews the cases from *Brown* v. *Maryland*, 12 Wheat., 419, down to *Cook* v. *Pennsylvania*, 97 U. S., 566, with a view to indicating that the question there involved was not as to whether a tax was direct or not, but whether it in reality affected the prohibited thing, that is, imports, exports or interstate commerce.

We have cited these cases simply with the purpose of showing that this Court will examine the Constitution in the light of its plain meaning, looking at each question from the standpoint of substance rather than form, and not feeling itself in any way bound by congressional or administrative usage unless the question is in itself so doubtful or ambiguous as to make usage valuable as a make-weight in reaching a conclusion.

We state thus candidly our views as we do not desire to attempt to hold untenable positions but consider that the cases adverted to, while not directly deciding the propositions contended for by appellant, necessarily and logically sustain his reasoning.

2. The second objection formulated by the Circuit Judge is as follows:

> "In whatever form a tax is laid its payment "must be primarily from the taxpayer's prop- "erty. In this sense the same is the subject of "the tax."

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This is a truism with which we have no quarrel. Every tax must fall ultimately on property, even a capitation tax, but the tax here in question *is levied directly upon the exercise of a right of property*, precisely as the tax found unconstitutional in the Income Tax cases was imposed upon another equally essential right of property, namely, the collection of the income or earnings of real estate or personalty.

3. Judge Thomas' third objection is that:

> " A statute providing for a direct tax with cer-
> " tainty burdens by lien or generally the tax
> " payer's property, and in theory appropriates *pro*
> " *tanto* his income and encumbers his principal,
> " while a statute providing for a tax on sales in-
> " terrupts no enjoyment of property, makes no
> " exaction from principal or income beyond
> " placing a tax upon a transaction attending the
> " disposition of property."

This objection seems to us to be unsound in its premise because a tax upon the power of sale necessarily encumbers the property. Should the power of sale be prohibited by law, property would certainly be much injured in value and would in fact cease to be property, so in a proportionate degree any encumbrance placed upon alienability must equally and progressively diminish the value of property (*vide* citations *Wynhamer* v. *Peo.*, *supra*). This seems to us too clear from the standpoint of ordinary deduction to require further comment.

4. The Judge's fourth objection is:

> " That the right to tax a pursuit, occupation or
> " business involves the right to tax the same in
> " whatsoever limited degree it is adopted and fol-
> " lowed, so that a right to tax one for carrying
> " on the business of selling shares of stock involves
> " the power to tax the sale of a single share of
> " stock."

This objection seems to us to radically ignore the basis of a business or occupation tax, which is in its nature a tax upon a license or privilege exercised by a certain class of persons. Probably the oldest occupation tax was that upon attorneys at law, and in the history of English and American taxation it has been extended to various other occupations.

> " A tax on the legal profession imposed, by Pitt, " in 1785, the same year as the taxes on shops and " pawnbrokers, formed one of the annual *license* " *taxes* he was at this date endeavoring to intro- " duce into our fiscal system." Dowell, Vol. III, p. 20.

To hold that the owner of property by exercising one of its fundamental attributes thereby becomes a business man exercising a privilege or license and taxable on such, seems to us wholly fallacious. It ignores the pith of plaintiff's contention which is that any tax is direct which is imposed upon one of the necessary incidents of all property ; the mere exercise of any one of which is an ordinary attribute of ownership regardless of whether it be exercised as an incident to a trade or calling or merely for the owner's immediate gratification and support.

5. His fifth objection is :

> " That the right to lay an unapportioned tax on " sales is not limited to sales of commodities " whereby the tax may be shifted in whole or " in part, and the conflicting views of the econo- " mists should influence the legislature and not " constrain the courts."

A tax upon sales of ordinary commodities has never been considered by economists a direct tax upon property, because the consumer was thought to pay the tax. While economists may not be wholly in ac-

cord on this point, taxes on spirits, tobacco, salt, sugar, etc., have always been considered as falling within the category of excises or indirect taxes, and the question was so absolutely and definitely settled by the trend of English tax legislation, prior to the time of the adoption of the Constitution, that there could have been no question in the minds of the framers that the word "direct" taxes did not include such excises.

In the recent case of *Patton* v. *Brady*, the point was suggested that a tax upon a manufacturer of tobacco is in reality a direct tax in the meaning of the Constition, to which Mr. Justice Brewer answered:

> "But as we have seen, it is not a tax upon prop-
> "erty as such but upon certain kinds of property,
> "*having reference to their origin and intended*
> "*use.*"

6. The Judge in the Thomas case appeals to the legislation of 1862 as showing a similar instance of taxation. This objection has already been adverted to in a preceding point.

7. His seventh objection is that

> "taxes on sales or transfers of property are indi-
> "rect within the holdings of the Supreme Court."

He relies to sustain this view largely upon the case of *Knowlton* v. *Moore*, 178 U. S., 41, which held, that a legacy or inheritance tax was levied neither directly upon the property itself, nor upon the power of the State to regulate inheritances, but upon the act of transmission itself, or upon the consequence of death which is the generating source of the tax. This case can have no application to the case at bar, because the act of transmission is a privilege accorded by the State to the heirs or devisees of the dead man. Such a privilege is not a property right as understood within the meaning of the Constitution of the United States.

If the State abolished it, such law would not fall within the condemnation of XIV Amendment. *Magoun* v. *Illinois Trust Company*, 170 U. S., 283, and, consequently, the tax falls not upon one of the three essential attributes of property but upon the right or privilege accorded by the State to legatees or devisees, which right or privilege is a comparatively recent creation of municipal law and not a fundamental property right. While Mr. Justice White suggests that indirect taxes may be regarded as a tax on an act or event this rule could not apply to an act which is a necessary incident to mere ownership. *Knowlton* v. *Moore*, 178 U. S., 41.

The eminent President Hadley of Yale says in regard to direct and indirect taxes:

"There is no doubt that there is a real distinction between these two kinds of taxes; but there is a great deal of doubt whether the distinction just drawn (which is that of Smith and Mill) correctly marks the line between them. * * *

"In view of this difficulty, Continental writers have generally preferred to define direct taxes as those which are assessed on persons (or property) and indirect taxes as those which are levied on acts. This is correct enough in its practical applications. But *it fails to indicate any real distinction of principle and therefore in a considerable number of cases which can be regarded in either light* (*e. g. taxes on occupations*) *we cannot use the definition as a criterion.* We decide on unformulated grounds to which class a tax belongs and interpret our definition accordingly." (Economics, page 461).

8. The last objection is that the tax is difficult if not impossible of apportionment. This argument, however, would have applied quite as well to the income tax and was urged with great vehemence in that case but did not find favor with the learned Court.

Concluding, therefore, we contend that in its nature the tax is directly and really upon property; that there is nothing in the historical genesis or development of the tax to show that it has ever been considered otherwise; and that further the *Income Tax Cases*, *Nicol* v. *Ames*, and *Fairbank* v. *U. S.* cannot be reconciled with any other theory.

All of which is respectfully submitted to the Honorable Court.

November, 30, 1903.

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